Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

BERNARDO G. BOCALBOS,
Petitioner,

vs.

NATIONAL WESTERN LIFE INSURANCE COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT NO. 97-50445

PETITION FOR WRIT OF CERTIORARI

BERNARDO G. BOCALBOS
Pro Se Petitioner
4980 Blackhawk Way
Denver, Colorado 80239
Telephone: (303) 375-9841

32 pp

QUESTIONS PRESENTED

1) The entitlement to leave under the Family and Medical Leave Act of 1993 expires at the end of the 12-month period beginning on the date the placement of a child with the employee for adoption occurs. Must "placement for adoption" always precede the adoption?

2) Can an employer require an employee to satisfy job requirements during a leave granted under the Family and Medical Leave Act of 1993 unless the employee proves that he or she is unable to do so?

Or, in the alternative ...

What job related activities, if any, did Congress intend eligible employees can be required to perform during a leave granted under the Family and Medical Leave Act of 1993?

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NO.....

IN THE SUPREME COURT OF THE UNITED STATES

BERNARDO G. BOCALBOS,
Petitioner,

vs.

NATIONAL WESTERN LIFE INSURANCE COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

Petitioner respectfully requests that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Fifth Circuit contained in its opinion which appears as Appendix A to the petition and is reported at 162 F. 3d 379 (5th Cir. 1998).

JURISDICTION

The U.S. Court of Appeals entered its judgment and opinion in this case on December 23, 1998. A timely petition for rehearing was denied by the U.S. Court of Appeals on March 16, 1999. A copy of the order denying the petition for rehearing appears at Appendix C. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1) 29 U.S.C. § 2612 Leave requirement

(a) In general

(1) Entitlement to leave
Subject to § 2613 of this title, an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following:

(A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter.

(B) Because of the placement of a son or daughter with the employee for adoption or foster care.

(C) In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.

(D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

> **(2) Expiration of entitlement**
> The entitlement to leave under subparagraphs (A) and (B) of paragraph (1) for a birth or placement of a son or daughter shall expire at the end of the 12-month period beginning on the date of such birth or placement.

2) **29 C.F.R. § 825.215 (b)**

> If an employee is no longer qualified for the position because of the employee's inability to attend a necessary course, renew a license, fly a minimum number of hours, etc. as a result of the leave, the employee shall be given a reasonable opportunity to fulfill those conditions upon return to work.

STATEMENT OF THE CASE

Petitioner began working for Respondent as an assistant actuary in 1989. In 1992 the Chief Actuary implemented an Actuarial Student Program which required all assistant actuaries to earn 40 Society of Actuaries examination credits by May 1994 in order to remain a qualified student in the Program. The Memorandum describing the Program stated that:

> [w]hile the taking of the exams is an individual decision on the part of the student, it should be understood that a decision to not continue the exams, without Chief Actuary approval, may reduce the likelihood of continued employment within the Actuarial Department.

In 1991, Petitioner began seeking U.S. Immigration and Naturalization Service ("INS") permission to allow his brother's two children in the Philippines to immigrate to the U.S. once petitioner's adoption of the children became final, which subsequently occurred on April 14, 1992. However, because of INS delays in processing the required paperwork, visas for the children were not granted until November 2, 1994. On February

20, 1995 Petitioner applied for leave under the Family and Medical Leave Act of 1993 ("FMLA") to bring his two adopted children from the Philippines to his home in Texas. On March 7, 1995 Respondent approved the leave from April 10, 1995 to June 16, 1995 (later extended to June 30). On March 28, 1995 Petitioner was instructed to read and initial a memo, which he subsequently did, from the Chief Actuary that stated unless he passed 40 exam credits in the exam sitting in May 1995, his employment would be terminated. Prior to March 28, 1995 Petitioner was never told that failure to pass 40 exam credits would result in his termination. Petitioner took his leave as scheduled during which time he did not sit for the exam. On July 18, 1995, shortly after his return to work, he was terminated for failure to pass 40 exam credits in the May 1995 exam sitting. Petitioner then filed suit and on May 5,1997 the U.S. District Court for the Western District of Texas, Austin Division, filed its judgment (Appendix B) in which the jury found Respondent had interfered with Petitioner's rights in violation of FMLA and had discharged Petitioner because he took FMLA leave. On December 23, 1998 the U.S. Court of Appeals for the Fifth Circuit reversed the judgment of the District Court and rendered judgment in favor of Respondent. In its opinion (Appendix A), the Court of Appeals held that: (1) relocation from the Philippines to Texas of children who had been adopted three years earlier was not "placement for adoption" which would entitle employee to unpaid leave under FMLA, and (2) employee's failure to earn required credits on actuarial exams constituted a valid reason for termination of his employment.

REASONS FOR GRANTING THE WRIT

(1) This case presents a novel question involving Section 102(a)(2) of the Family and Medical Leave Act of 1993 ("FMLA"), 29 USC § 2612 (a)(2). That Section ends an eligible employee's entitlement to 12 weeks of unpaid leave for placement of a child with the employee for adoption 12 months after the placement. The U.S. District Court for the Western District of Texas found petitioner was entitled to FMLA leave to place his two children adopted in the Philippines three years earlier into

their new home in Texas because the U.S. Immigration and Naturalization Service ("INS") took two and one half years after the adoption to approve their orphan petitions and visa applications timely filed by petitioner to allow them to travel from the Philippines to the United States. The Court of Appeals for the Fifth Circuit disagreed, holding in its opinion (see Appendix A at p. A7) that: "[t]he Act contemplates placement for adoption to include the circumstances in which a child is placed in a home before the adoption is finalized," but not a situation where a child is adopted in another country and then brought to his or her new home in the United States by the adoptive parent after an extended period of time. In contrast, the District Court Judge, James Nowlin, held in his Order and Partial Judgment dated December 10, 1996 (see Appendix D at p. A17–A18):

> The term "placement" is not defined in the FMLA or the regulations and nothing in the statute, the regulations or case law provides that placement is to occur only before the adoption ... It would be inconsistent to read section 2612(2) [2612(a)(2)] as allowing FMLA leave after the birth of a child, but not allowing FMLA leave after an adopted child is introduced into his or her new parent's home.

The question presented in this case of whether "placement for adoption" must precede the adoption could occur with some frequency. International adoptions are increasingly common in the U.S. Many foreign countries as well as the INS can require prospective parents to adopt abroad first before bringing the child to the U.S. If because of the many foreign, national, and state requirements involved in the adoption process, it takes more than nine months after the adoption abroad to process the required paperwork and visa to allow the child to enter the U.S., then under the Court of Appeals ruling in this case, parents adopting internationally may be denied all or some of the full 12 week entitlement to FMLA leave for the purpose of placing their adopted child in their new home in the U.S. and having time to bond with the child immediately after the placement. Petitioner

believes Congress did not intend for there to be disparate treatment in access to FMLA entitlement between those persons adopting internationally, where placement often occurs after adoption, and those adopting domestically, where placement almost always occurs before adoption.

(2) The U.S. Department of Labor ("DOL") regulations interpreting the FMLA state at 29 C.F.R. 825.215(b):

> If an employee is no longer qualified for the position because of the employee's inability to attend a necessary course, renew a license, fly a minimum number of hours, etc. as a result of the leave, the employee shall be given a reasonable opportunity to fulfill those conditions upon return to work.

Without specifically addressing the above DOL regulation, the Court of Appeals for the Fifth Circuit held that Respondent did not interfere with Petitioner's FMLA leave by requiring him to pass a competency exam involving over 200 hours of study time during his approved leave rather than requiring him to pass the next regularly scheduled exam following his return to work from leave. In its appellate briefs, however, Respondent did specifically address the DOL regulation. Respondent interprets the regulation to mean that an employer can require an employee to satisfy job requirements during FMLA leave unless the employee proves that he or she is unable to do so. Petitioner disagrees. Such an interpretation thwarts the fundamental purpose of the FMLA, which is to give an eligible employee time away from work responsibilities to fulfill certain family needs, regardless of whether the employee is physically capable of working. Many adoptive parents may be physically capable of spending over 200 hours away from their children during FMLA leave to prepare for and satisfy a competency exam, but to force them to do so deprives them of the statutory period of time with their children that the FMLA guarantees. If a job requirement interferes with an

employee's leave, the DOL regulation requires that an employer accommodate its employee by giving him or her time after return to work to meet the requirement. In the instant case, Petitioner, whose last job performance evaluation in November 1994 was satisfactory and was followed by a salary increase, was granted FMLA leave on March 7, 1995. On March 28, 1995, thirteen days before his leave began, he was given an ultimatum for the first time that he must pass 40 actuarial exam credits in May 1995 during the middle of his leave or else his employment would be terminated. On July 18,1995, fifteen days after his return to work from leave, he was terminated for failure to pass 40 exam credits in the May 1995 exam sitting. The question posed to this Court is what job related activities, if any, did Congress intend eligible employees can be required to perform when on FMLA leave.

CONCLUSION

The petition for a writ of certiorari should be granted because the questions presented involve novel situations impacting a potentially large class of people. FMLA is a relatively new act with an evolving body of law that could benefit from this Court's answers to the questions presented.

Respectfully submitted,

BERNARDO G. BOCALBOS
Pro Se Petitioner
4980 Blackhawk Way
Denver, Colorado 80239

APPENDIX

APPENDIX A

United States Court of Appeals
For the Fifth Circuit

No. 97-50445

BERNARDO G. BOCALBOS,
Plaintiff-Appellee/Cross-Appellant,

versus

NATIONAL WESTERN LIFE INSURANCE COMPANY,
Defendant-Appellant/Cross-Appellee.

U.S. COURT OF APPEALS
FILED
DECEMBER 23, 1998
Charles R. Fulbruge III
Clerk

Appeals from the United States District Court
for the Western District of Texas

December 23, 1998

Before POLITZ, Chief Judge, JONES and DUHÉ, Circuit Judges.
POLITZ, Chief Judge:

National Western Life Insurance Company seeks reversal of judgment on a jury verdict based on claims that it violated the family Medical Leave Act of 1993 ("FMLA"),[1] by interfering with Bernardo Bocalbos' leave and subsequently terminating his employment in retaliation for taking FMLA leave.

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[1] 29 U.S.C. §§ 2601-2619.

Background

Bocalbos was born in the Philippines and became a naturalized citizen in 1987. In January 1989, he began working in National Western's actuarial department as an assistant actuary. In 1992 the Chief Actuary implemented a Student Actuarial Program which required all assistant actuaries to earn 40 Society of Actuaries examination credits by May 1994 in order to remain employed in the actuarial department.[2] The Program provided certain incentives for assistant actuaries to take the examinations, including permitting study time at work, paying for study materials and the costs of the first two examinations, and increasing the employee's salary for examinations passed. The memorandum describing the Program stated that "[w]hile the taking of the exams is an individual decision on the part of the student, it should be understood that a decision to not continue with the exams, without Chief Actuary approval, may reduce the likelihood of continued employment within the Actuarial Department."

From 1992 to early 1995, there were three assistant actuaries in the department — Bocalbos, Carol Lo, and David Olson. By the end of the May 1994 examinations none of the employees had achieved the requisite 40 credits; Lo had earned 35 credits, Olson had earned 15, and Bocalbos had earned none. The Chief Actuary extended the time, permitting all three employees to sit for the November 1994 exams. After the November 1994 exams Lo picked up an additional 40 credits, bringing her total exam credits to 75, Olson earned an additional 15 credits bringing his total to 30, but Bocalbos did not pass any exam, leaving him with zero credits.

In April 1992, Bocalbos adopted his brother's two children who lived in the Philippines. On April 13, 1993, Bocalbos petitioned the Immigration and Naturalization Service for Relative Immigrant Visas. The visas were granted on November 2, 1994. In

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[2] The actuarial exams are given twice a year in May and November. A person sitting for an examination can earn between 10 to 40 credits depending on the examination that is taken.

February 1995, Bocalbos requested FMLA leave, from April 10, 1995 to June 16, 1995, to bring the children from the Philippines to Austin, Texas. Defendant approved the leave on March 7, 1995. On March 28, 1995 Bocalbos read and initialed a memorandum from the Chief Actuary that stated that unless he passed at least 40 credits in the Actuarial Examination sittings in May of 1995, his employment would be terminated.

Before his leave began Bocalbos signed up to take several Society of Actuaries examinations in May 1995. Upon his return to work on July 3, 1995, however, he reported that he did not take the May exams.[3] Shortly thereafter, Bocalbos was terminated for failure to take and pass the actuarial examinations. He filed this complaint in state court claiming that he was fired in violation of the FMLA and Title VII. After removal to federal court, both parties filed motions for summary judgment. The district court dismissed the Title VII claim, but denied the motion as to the FMLA claims. A jury found that National Western had interfered with Bocalbos' FMLA rights and terminated him in retaliation for having requested and taken leave. National Western unsuccessfully moved for judgment as a matter of law. The district court ultimately awarded Bocalbos damages of $26,106.82 with post-judgment interest. The court ordered that Bocalbos be reinstated, but denied his request for liquidated damages. Both parties timely appealed.

Analysis

We review de novo the trial court's ruling on a motion for judgment as a matter of law under Fed.R.Civ.P. 50(a).[4] Such a judgment should be granted not only when the non-movant

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[3] Bocalbos faxed a memorandum to Carol Jackson, National Western's Vice President of Human Resources, requesting an additional two weeks, which was granted. As a result, Bocalbos' leave lasted 12 weeks, beginning on April 10, 1995 and ending on June 30, 1995.

[4] **Omnitech Int'l, Inc. v. Clorox Co.**, 11 F.3d 1316 (5th Cir. 1994); **Travis v. Bd. of Regents of Univ. of Tex.**, 122 F.3d 259 (5th Cir. 1997), cert. denied, 118 S.Ct. 1166 (1998).

presents no evidence, but also when there is not a sufficient "conflict in substantial evidence to create a jury question."[5]

The Family Medical Leave Act of 1993 was enacted to permit employees to take reasonable leave for medical reasons, for birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition.[6] The Act seeks to meet the needs of families in a manner that accommodates the legitimate interests of employers.[7] The Act applies to private-sector employers of 50 or more employees[8] and an employee is eligible for FMLA leave after working for a covered employer for at least 1250 hours during the preceding 12 months.[9] It is undisputed that National Western is a covered employer and that Bocalbos is an eligible employee.

The Act has two distinct provisions. First, it provides certain entitlements.[10] An eligible employee of a covered employer has the right to take unpaid leave for a period of up to 12 workweeks in any 12-month period when the employee has "a serious health condition that makes [him or her] unable to perform the functions of [his or her] position"; [11] to care for a close family member with a serious health condition;[12] because of the birth of a son or daughter;[13] or placement of a child with the employee for adoption or foster care.[14] Following a qualified leave period, the employee is

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[5] **Foreman v. Babcock & Wilcox Co.**, 117 F.3d 800, 804 (5th Cir. 1997) (citation omitted), cert. denied, 118 S.Ct. 1050 (1998).

[6] 29 U.S.C. § 2601(b)(1) & (2).

[7] 29 U.S.C. § 2601(b)(3).

[8] 29 U.S.C. § 2611(4).

[9] 29 U.S.C. § 2611(2).

[10] See **Hodgens v. General Dynamics Corp.**, 144 F.3d 151 (1st Cir. 1998); **Diaz v. Fort Wayne Foundry Corp.**, 131 F.3d 711 (7th Cir. 1997); **Morgan v. Hilti, Inc.**, 108 F.3d 1319 (10th Cir. 1997).

[11] 29 U.S.C. § 2612(a)(1)(D).

[12] 29 U.S.C. § 2612(a)(1)(C).

[13] 29 U.S.C. § 2612(a)(1)(A).

[14] 29 U.S.C. § 2612(a)(1)(B); see also § 2611(12).

entitled to reinstatement to the former position or an equivalent one with the same benefits and terms.[15] Second, the Act protects employees from interference with their leave as well as against discrimination or retaliation for exercising their rights.[16] It is "unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any rights provided under" the Act.[17] Further, an employer is prohibited from discriminating or retaliating against an employee for exercising his rights under the Act.[18]

Bocalbos asserts violations of the anti-discrimination provisions of the Act because National Western allegedly improperly interfered with his right to take leave by requiring that he take the exam during his leave and then subsequently discharging him in retaliation for having taken the FMLA leave. To establish a prima facie case for discrimination or retaliation under the FMLA, the plaintiff must demonstrate that: (1) he is protected under the FMLA; (2) he suffered an adverse employment decision; and either (3a) that the plaintiff was treated less favorably than an employee who had not requested leave under the FMLA; or (3b) the adverse decision was made because of the plaintiff's request for leave.[19] If the plaintiff succeeds in making a *prima facie* case, the burden shifts to the employer to articulate a legitimate nondiscriminatory or nonretaliatory reason for the termination. Once the employer has done so, the plaintiff must show by a preponderance of the evidence that the employer's reason is a pretext for discrimination or retaliation. [20]

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[15] 29 U.S.C. § 2614(a).

[16] **Hypes v. First Commerce Corp.**, 134 F.3d 721 (5th Cir. 1998); **Hodgens; Diaz.**

[17] 29 U.S.C. § 2615(a)(1).

[18] 29 U.S.C. § 2615(a)(2).

[19] **Oswalt v. Sara Lee Corp.,** 889 F.Supp. 253 (N.D.Miss. 1995), aff'd, 74 F.3d 91 (5th Cir. 1996); **Hodgens,** 144 F.3d at 160-161; **Diaz,** 131 F.3d at 712; **Hilti,** 108 F.3d at 1323.

[20] **Oswalt,** 889 F.Supp. at 259; **Hypes.**

The district court, in its summary judgment order, found that although the adoption proceedings began in the Philippines in 1991, the INS procedures for bringing the children to the United States were not completed until the INS granted the children their visas in November 1994. The trial court observed that the Act suggests "that the adoption provision was intended in part, to address the needs for the parent's presence when the child is first introduced into his or her new home. The text of the FMLA notes the importance to a child's development that parents be able to participate in early child rearing."[21] The district court concluded that under the unique facts of this case, Bocalbos was protected under the FMLA. We do not agree.

The statute permits employees to take unpaid leave "[b]ecause of the placement of a son or daughter with the employee for adoption or foster care."[22] Further, when taking such leave because of the placement of a child, the employee's entitlement to FMLA leave "shall expire at the end of the 12-month period beginning on the date of such . . . placement."[23] We conclude that the Act is inapplicable in the situation at bar. The adoption of the two children was made final in April 1992, more than one year before the effective date of the Act on August 5, 1993. In April 1992, Bocalbos had become a parent of the children, with complete rights, obligations and responsibilities, yet he sought FMLA leave almost three years after the adoption was finalized.[24] While we recognize the importance of child-parent

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[21] District Court "Order and Partial Judgment," December 10, 1996 at 6.

[22] 29 U.S.C. § 2612 (a)(1)(B).

[23] 29 U.S.C. § 2612(a)(2); 29 C.F.R. § 825.201.

[24] The Department of Labor regulations provide:

> Employers covered by FMLA are required to grant FMLA leave pursuant to paragraph (a)(2) of this section before the actual placement or adoption of a child if an absence from work is required for the placement for adoption or foster care to proceed. For example, the employee may be required to attend counselling sessions, appear in court, consult with his or her attorney or the doctor(s) representing the birth parent, or submit to a physical examination. The source of an adopted child (e.g., whether from a licensed placement agency or otherwise) is not a factor in determining eligibility for leave for this purpose. 29 C.F.R. § 825.112(d) (1997).

bonding and of a parent's presence in early child rearing, we cannot read the Act to extend "placement for adoption" to encompass Bocalbos' situation. The children, ages 17 and 12, were not being placed for adoption in April 1995, but were being brought to the United States to live in Austin, Texas. The Act contemplates placement for adoption to include the circumstances in which a child is placed in a home before the adoption is finalized.[25] There is no indication, however, that Congress intended placement to include a situation in which the children were actually adopted, left in another country for an extended period of time and then retrieved at the convenience of the adoptive parent. Congress placed a 12-month limitation on the eligibility so that the period of time for employees to request leave would not be indefinite or too far removed from the actual adoption.[26]

Bocalbos also contends that the defendant granted the leave and therefore should not be permitted to now insist that the FMLA was not applicable.[27] His argument is not persuasive in light of the fact that National Western was not aware at the time of his request that he had adopted the children in 1992.

Even if the Act did apply to the facts of this case, it is clear that National Western did not interfere with Bocalbos' leave and tendered a nonretaliatory reason for his termination. National Western did not "interfere with, restrain, or deny the exercise of or the attempt to exercise" Bocalbos' FMLA rights. Rather, National Western made it clear that the actuary students would be required to take the exams in May and November of each year until they achieved the requisite score. Bocalbos was fully aware of the test dates when he placed his request for leave from April through June. When questioned, he acknowledged that he could have chosen the time period after the exam to take the leave.

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[25] See 29 C.F.R. § 825.112(d) (1997).

[26] 29 U.S.C. § 2612(a)(2).

[27] It is the employee's [employer's] responsibility to determine whether leave qualifies under the FMLA. 29 C.F.R. § 825.208(a); see also **Manuel v. Westlake Polymers Corp.**, 66 F.3d 758 (5th Cir. 1995).

As for Bocalbos' termination, the attainment of the Society of Actuaries examination credits had been a job requirement since June 1992, and at the time of his termination in June 1995, Bocalbos had attained no credits whatsover. The failure to satisfy a legitimate job requirement is a nondiscriminatory reason and sufficient grounds for his termination.[28] We conclude and hold that no reasonable juror could conclude that National Western fired Bocalbos because he took leave under the FMLA.[29]

The judgment against National Western is REVERSED and judgment is RENDERED herein in favor of National Western, rejecting the claims of Bernardo Bocalbos.

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[28] **Faruki v. Parsons S.I.P., Inc.**, 123 F.3d 315 (5th Cir. 1997); **Nichols v. Loral Vought Sys. Corp.**, 81 F.3d 38 (5th Cir. 1996); **Hilti.**

[29] See **Hypes**.

APPENDIX

APPENDIX B

The United States District Court
For the Western District of Texas
Austin Division

A-96-CA-258

BERNARDO G. BOCALBOS

FILED
MAY 5, 1997
U. S. DISTRICT COURT
CLERK'S OFFICE
BY s/MLC DEPUTY

v.

NATIONAL WESTERN LIFE INSURANCE COMPANY

JUDGMENT

This action came on for trial before the Court and a jury the week of March 10, 1997, the Honorable Lucius D. Bunton, III, Senior Judge presiding, wherein Plaintiff Bernardo Bocalbos and Defendant Great [National] Western Life Insurance Co. announced ready for trial.

A jury having been duly selected, empaneled and sworn, and having heard the evidence, arguments of counsel and charge of the Court, and their oath did, on March 13, 1997, for their verdict and in response to the definitions, instructions, and questions submitted to them by the Court, make the following findings of fact:

Question Number One

Do you find from a preponderance of the evidence that National Western Life Insurance Company interfered with Bernardo Bocalbos' rights in violation of the Family and Medical Leave Act?

Answer "yes" or "no": Yes

Question Number Two

What amount of money, if paid now in cash, would fairly and reasonably compensate the Plaintiff for his damages, if any, that resulted in the Defendants wrongful conduct you found in the preceding question?

Answer in dollars and cents or "none": $ 4,361.68

Question Number Three

Do you find from a preponderance of the evidence that a reason National Western Life Insurance Company discharged Plaintiff was because he requested and/or took FMLA leave?

Answer "yes" or "no": Yes

Question Number Four

What amount of money, if paid now in cash, would fairly and reasonably compensate Plaintiff for the damages he sustained, if any, as a proximate result of Defendant's conduct you found in Question Number Three?

Answer in dollars and cents or "none": $ 26,106.82

Accordingly,

IT IS ORDERED, ADJUDGED AND DECREED by the Court that the Plaintiff Bernardo Bocalbos shall recover

TWENTY-SIX THOUSAND, ONE HUNDRED, SIX DOLLARS AND EIGHTY-TWO CENTS ($26,106.82) as to Defendant National Western Life Insurance Co.

IT IS FURTHER ORDERED that all costs of Court shall be assessed against Defendant National Western Life Insurance Co.

IT IS FURTHER ORDERED that Plaintiff's are [Plaintiff is] awarded post-judgment interest at the rate of 6.00 percent per annum.

IT IS FURTHER ORDERED that Plaintiff shall recover his reasonable and necessary attorney's fees from Defendant National Western Life Insurance Co.

IT IS FINALLY ORDERED that all such further relief not herein expressly granted is hereby denied.

SIGNED this FIRST day of May, 1997.

s/ Lucius D. Bunton

HONORABLE LUCIUS D. BUNTON III
SENIOR U.S. DISTRICT JUDGE

APPENDIX

APPENDIX C

In The United States Court of Appeals For The Fifth Circuit

No. 97-50445

BERNARDO G. BOCALBOS,
Plaintiff-Appellee/Cross-Appellant,

v.

NATIONAL WESTERN LIFE INSURANCE COMPANY,
Defendant-Appellant/Cross-Appellee.

U.S. COURT OF APPEALS
FILED
MARCH 16, 1999
Charles R. Fulbruge III
Clerk

Appeals from the United States District Court for the Western District of Texas, Austin

ON PETITION FOR REHEARING

Before POLITZ, JONES, and DUHÉ, Circuit Judges

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is denied.

ENTERED FOR THE COURT:

s/ Henry A. Politz
United States Circuit Judge

APPENDIX

APPENDIX D

In The United States District Court
For The Western District of Texas
Austin Division
Civil No. A-96-CA-258 JN

BERNARDO G. BOCALBOS,

vs.

NATIONAL WESTERN LIFE INSURANCE COMPANY,

FILED
DECEMBER 10 3:22 PM '96
U.S. CLERKS OFFICE
BY s/ TL DEPUTY

ORDER AND PARTIAL JUDGMENT

Before the Court are Plaintiff's Motion for Partial Summary Judgment filed on November 1, 1996 (Clerk's Doc. No. 19) and Defendant's Motion for Summary Judgment filed on November 4th (Clerk's Doc. No. 23). Defendant filed its Response to Plaintiff's Motion for Partial Summary Judgment on November 12th (Clerk's Doc. No. 25). Plaintiff filed his Opposition to Defendant's Motion for Summary Judgment on November 21st (Clerk's Doc. No. 28). Upon careful review of the motions, the responses, the applicable legal authorities and the entire case file, the Court enters the following Order and Partial Judgment.

Background Facts

Plaintiff Bernardo Bocalbos began working in Defendant's actuarial department as an assistant actuary in January 1989. The director of the actuarial department, Paul Facey, implemented a

"Student Actuarial Program" in June 1992. This program established criteria for earning Society of Actuaries ("SOA") examination credits. The program required Defendant's assistant actuaries to earn 40 examination credits by May 1994 in order to remain employed in the actuarial department. From 1992 to early 1995, the Defendant's assistant actuaries in the department included Plaintiff, Carol Lo and David Olson.

Plaintiff adopted his brother's two children in the Philippines on April 14, 1992. Plaintiff began seeking INS permission to allow the children to immigrate to the United States in July 1991. Defendant notes, however, that Plaintiff did not file a petition with the INS to get the children Relative Immigrant Visas to the U.S. until April 3, 1993. The visas were granted on November 2, 1994. In February 1995, Plaintiff requested leave under the Family and Medical Leave Act ("FMLA") to bring the children from the Philippines to the United States. Defendant's human resources department approved the leave on March 7, 1995.

Plaintiff's leave lasted twelve weeks, beginning on April 10, 1995 and ending on June 30. Plaintiff returned from his leave to his previous position and with his previous salary. Plaintiff's employment, however, was terminated on July 18, 1995. Defendant argues that Plaintiff was given a reasonable period of time to sit for and earn actuarial exam credits and either refused to sit for exams or failed the exams altogether. Thus, Defendant claims that Plaintiff was fired for his failure to earn any SOA actuarial exam credits. Plaintiff argues that he was fired in violation of the FMLA and in violation of Title VII of the 1964 Civil Rights Act. Defendant requests summary judgment on all Plaintiff's claims, and Plaintiff seeks summary judgment on his FMLA claim.

Summary Standard Judgment

A party moving for summary judgment has the burden of showing that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). The party moving for

summary judgment bears the initial burden of showing the basis for the motion, and of identifying the pleadings and evidence which it believes demonstrates the absence of a genuine issue of material fact. Washington v. Armstrong World Industry, Inc., 839 F.2d 1121 (5th Cir. 1988). Once a summary judgment motion is made and properly supported, the non-movant must go beyond the pleadings and designate specific facts in the record showing that there is a genuine issue for trial. FED. R. CIV. P. 56(e); Little v. Liquid Air Corp., 37 F. 3d 1069, 1075 (5th Cir. 1994) (en banc). Pleadings are not summary judgment evidence. Id.; Wallace v. Texas Tech Univ., 80 F.3d 1042, 1047 (5th Cir. 1996).

FAMILY AND MEDICAL LEAVE ACT CLAIM

Plaintiff argues that he was terminated in violation of the Family and Medical Leave Act ("FMLA'). 29 U.S.C. §§ 2601-2654. The FMLA provides eligible employees of a covered employer the right to take unpaid leave for a period of up to twelve workweeks in any twelve month period "[b]ecause of the placement of a son or daughter with the employee for adoption or foster care." 29 U.S.C. § 2612(a)(1)(B). Following a qualified leave period, an employee is entitled to reinstatement to the former position or an equivalent one with the same benefits and terms. Id. § 2614(a). The FMLA makes it "unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any rights provided under this subchapter." Id. § 2615(a).

To establish a *prima facie* case under the FMLA, the plaintiff must demonstrate that (1) he is protected under the FMLA, that (2) he suffered an adverse employment decision, and either that (3a) the plaintiff was treated less favorably than an employee who had not requested leave under the FMLA or that (3b) the adverse decision was made because of the plaintiff's request for leave. Oswalt v. Sara Lee Corp., 889 F. Supp. 253, 259 (N. D. Miss. 1995), aff'd, 74 F.3d 91 (5th Cir. 1996). If the plaintiff succeeds in making a *prima facie* case, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the termination. Id. Once the employer has done so, the burden shifts back to the plaintiff to show by a preponderance of the evidence that the employer's reason is a pretext for unlawful

discrimination. Id. The plaintiff bears the ultimate burden of proving that FMLA leave was the determining factor in the employment decision at issue. Id.

As an initial matter, Defendant claims that Plaintiff was not entitled to FMLA leave. The statute allows certain employees[1] to take the unpaid leave "[b]ecause of the placement of a son or daughter with the employee for adoption or foster care." 29 U.S.C. § 2612(a)(l)(B). When taking leave because of the placement of a child, the employee's entitlement to FMLA leave "expire[s] at the end of the 12-month period beginning on the date of such ... placement." Id. § 2612(a)(2); 29 C.F.R. § 825.201. Defendant argues that Plaintiff's adoptive children were placed in his custody and adopted by order of the Philippine court on April 14, 1992. Defendant argues that the Act and regulations support its position that "placement" contemplates leave before the actual adoption so that the adoption process may proceed. Thus, Defendant contends that Plaintiff's leave had to be completed within a one-year period after April 1992.[2] Defendant also argues that Plaintiff requested FMLA leave in February 1995 for the purpose of adopting his brother's two children then living in the Philippines — and had Plaintiff informed the Defendant that the children were actually adopted in April 1992, the FMLA leave would have been denied.

Plaintiff responds that the term "placement" in the statute refers to the placement of the adopted children in the adoptive

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[1] To be eligible for leave, an employee must meet two criteria: (1) the employee must have been employed by the employer from whom leave is requested for at least 12 months from the date the leave commences; and (2) he must have provided the employer with at least 1250 "hours of service" during the previous 12-month period. See 29 U.S.C. § 2611(2); 29 C.F.R. § 825.110. There appears to be no argument that Plaintiff qualifies as an "eligible employee" under the FMLA. Furthermore, there is no dispute that Defendant is a covered "employer" under the terms of the Act, see 29 U.S.C. § 2611(4), and that Plaintiff properly notified Defendant of his need for FMLA leave, see id. § 2612(e)(1).

[2] Defendant makes two arguments. First, Defendant argues that, because the FMLA became effective on August 5, 1993, Plaintiff was ineligible to take FMLA leave as a result of the April 1992 adoption and placement. Alternatively, Defendant contends that, even if the Act applied, Plaintiff had to complete his leave within one year of April 1992.

parents' home. In this case, the children could not be placed in Plaintiff's home in the United States until he received approval from the INS. That approval process, Plaintiff argues, took over three years and Plaintiff did not obtain final approval from the INS to bring the children to live with him until November 1994. Thus, Plaintiff's request for FMLA leave in February 1995 was timely.

Furthermore, Plaintiff explains that he provided all the relevant information about his leave request to Defendant, including a copy of the 1992 adoption decree. In fact, Plaintiff's leave request, dated February 20, 1995, specifically explained that "the US Immigration and Naturalization Service approved the orphan petition I filed for my two adopted children ..." (emphasis added). Plaintiff, thus, claims that any assertion that he fraudulently obtained the FMLA leave is without foundation.

The Court finds under the unique facts of this case that Plaintiff was entitled to FMLA leave. The foreign adoption proceedings began in the Philippines as early as 1991. Plaintiff took vacation leave in 1992 and traveled to the Philippines to attend the adoptions' legal proceedings. Because Plaintiff was a U.S. citizen, he could not remain in the Philippines with his newly-adopted children. The children could not travel to the United States until the INS granted permission. The INS procedure for bringing the children to the states — outlined in materials filed by Plaintiff — was not completed until the INS granted the children their visas in November 1994.

The term "placement" is not defined in the FMLA or the regulations and nothing in the statute, the regulations or case law provides that placement is to occur only before the adoption.[3] The Act suggests that the adoption provision was intended, in part, to

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[3] Defendant argues that the regulations support its argument that placement is to occur before the actual adoption. The regulations state that an employer must grant leave "before the actual placement or adoption of a child if an absence from work is required for the placement for adoption of foster care to proceed." 29 C.F.R. § 825.112(d). The Court does not interpret this provision as mandating that leave for adoption of a child occur before the actual adoption. The provision merely recognizes that circumstances may require that leave begin prior to the actual date of the placement.

address the need for the parent's presence when the child is first introduced into his or her new home. The text of the FMLA notes the importance to a child's development that parents be able to participate in early child rearing. 29 U.S.C. § 2601(a)(2); see also S. REP. No. 3, 103d Cong., 1st Sess. 8, reprinted in 1993 U.S.C.C.A.N. 3, 10-11 (noting that leave is important during the period of adjustment after the adoption).

By comparison, the provision allowing leave, by the mother or father, because of the birth of a child provides for leave when a parent is unable to work due to the pregnancy, the childbirth, related medical conditions, or after the childbirth. See id. (noting the importance of "infant-parent bonding during the first few months of a child's life"). Thus, the childbirth provision may be used to be with the child for the first few weeks after the child's birth. It would be inconsistent to read section 2612(2) [2612(a)(2)] as allowing FMLA leave after the birth of a child, but not allowing FMLA leave after an adopted child is introduced into his or her new parents' home.

The Court finds that Plaintiff was eligible for FMLA leave in March 1995 as long as the leave was being taken "because of" the placement of a child for adoption. The evidence before the Court demonstrates that Plaintiff requested his leave because of the adoption of the two children in the Philippines. Furthermore, Defendant approved the request for leave. While Defendant now argues that it was unaware that Plaintiff had legally adopted the children when it approved his leave, the evidence shows that Plaintiff submitted his request for FMLA leave to bring his "two adopted children" to the United States and that Defendant received a copy of the adoption decree. In fact, Defendant's vice-president for human resources testified that Plaintiff did not misrepresent the fact that the children had been adopted when leave was requested.

In light of the above, the Court finds that Plaintiff established the first prong of a *prima facie* case of a violation of the FMLA — that he is protected under the FMLA and was exercising or attempting to exercise his rights under the Act. Second, Plaintiff was subjected to an adverse employment action by being fired. Finally, the Court finds that Plaintiff has

demonstrated, for purposes of a *prima face* [*facie*] case, that he was treated less favorably than an employee who had not requested leave under the FMLA. For instance, Plaintiff has produced some evidence that another assistant actuary had not achieved the required actuarial exam credits but remained employed after Plaintiff was fired.

Defendant, however, has demonstrated a legitimate nondiscriminatory reason for its employment decisions. As noted above, in 1992, Defendant's actuarial department implemented its Student Actuarial Program ("SOA") for all assistant actuaries. All assistant actuaries were required to earn forty SOA exam credits by the end of May 1994. SOA exams were given in May and November. By May 1994, Plaintiff had not earned any credits. The other assistant actuaries, Carol Lo and David Olson, had earned credits by this time but had not earned the requisite forty credits. Thus, director Paul Facey extended the program to allow additional time for sittings in which to earn the credits. After the November 1994 exam, Lo had 70 credits, Olson had 30 credits, and Plaintiff had none.

After Plaintiff requested leave in February 1995, to begin that April, Plaintiff and Facey discussed whether Plaintiff would sit for the May 1995 SOA examination. Plaintiff apparently indicated that he would write his SOA exam while in the Philippines, and Defendant contends that Plaintiff was warned that he would face discharge if he did not earn the 40 credits in the May 1995 exam. Plaintiff did not take the May 1995 exam. Upon his return from leave in July 1995, Plaintiff was fired for his failure to earn any actuarial exam credits and his failure to take the May 1995 exam.

Because the Court has found that Defendant has provided a legitimate, nondiscriminatory reason for Plaintiff's discharge, Plaintiff must come forward with evidence that Defendant's legitimate reason is merely a pretext for discrimination. Plaintiff argues that the "ultimatum" that he earn 40 credits in the May 1995 examination was retaliation for his family leave request. Plaintiff has provided evidence that his work performance since 1992 and his knowledge of actuarial mathematics were

satisfactory. Defendant gave Plaintiff a satisfactory performance appraisal and a raise in November 1994—three months before the leave request.

Plaintiff also notes that only Carol Lo had earned the 40 credits. The other assistant actuary, David Olson, had not achieved 40 credits but was not fired after the May 1995 exam. Thus, Plaintiff argues that the "40 credit/May 1995 deadline" was arbitrary and imposed because Plaintiff asked for FMLA leave. Plaintiff notes that the deadline was never mentioned until after he requested leave.

Plaintiff further argues that the "arbitrary 40 credit/May 1995 deadline" interfered with his rights under the FMLA. That is, Plaintiff suggests that he could not properly study for the exam because of his responsibilities for the children. Plaintiff claims that he left his children for two and a half weeks during his leave in an effort to take the examination in St. Paul, Minnesota. Plaintiff testified, however, that he was "too exhausted and suffering from too much stress to get there on time."[4]

While Defendant offers legitimate explanations for its actions, the Court finds that there are questions of fact on Plaintiff's FMLA claim that preclude summary judgment. There is enough conflicting testimony and evidence to create an issue of fact as to whether Defendant's employment decisions were made because of Plaintiff's requests for leave. Accordingly, the Court will deny Defendant's Motion for Summary Judgment as to Plaintiff's FMLA claim. For the same reasons noted above, the Court will also deny Plaintiff's Motion for Partial Summary Judgment on his FMLA claim. Defendant has presented evidence and testimony in its response to Plaintiff's Motion that create fact issues as to whether Plaintiff was treated differently because of his request for leave and whether Plaintiff was qualified for his position.

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[4] As noted above, the FMLA prohibits an employer from interfering with the attempt to exercise FMLA rights. 29 U.S.C. § 2615. The regulations provide that an employer may not interfere with or restrain the exercise of rights under the Act and prohibit an employer from "changing the essential functions of the job in order to preclude the taking of leave." 29 U.S.C. § 825.220.

TITLE VII CLAIM

Defendant requests that the Court grant summary judgment on Plaintiff's Title VII claim of race and national origin discrimination. Title VII prohibits intentional discrimination on the basis of race and/or national origin. 42 U.S.C. §§ 2000e to 2000e-17 [.] To succeed on a claim of intentional discrimination, the plaintiff must make a showing sufficient to establish the putative existence of every element that is essential to their case. Davis v. Chevron, U.S.A. Inc., 14 F.3d 1082, 1084-85 (5th Cir. 1994). When lacking direct evidence of discrimination, a plaintiff may make this showing inferentially by following a three-step procedure. First, the plaintiff must prove by a preponderance of the evidence a *prima facie* case of disparate treatment. See McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973); Norris v Hartmarx Specialty Stores, Inc. 913 F.2d 253, 254 (5th Cir. 1990).

To establish a prima facie case, Plaintiff must show that (1) he belongs to a protected group; (2) that he was qualified for his job; (3) despite his qualifications, he suffered an adverse employment action; and (4) that other employees of similar qualifications who were not members of the protected group were treated more favorably. If the plaintiff is successful in demonstrating his *prima facie* case, the burden shifts to the defendant to proffer a legitimate, non-discriminatory reason for its decision. If that is done, the plaintiff may attempt to demonstrate that the defendant's proffered explanation is pretextual. See St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742 (1993).

Construing the facts in the light most favorable to the non-movant, the Court finds that Plaintiff does present a *prima facie* case of employment discrimination. As noted in the previous section of this Order, Defendant has presented a legitimate, nondiscriminatory reason for its actions. Thus, the burden again shifts to Plaintiff to show that Defendant's proffered reasons are merely a pretext for illegal race and national origin discrimination. In this respect, Plaintiff has wholly failed to produce any evidence from which a jury could reasonably believe that Defendant's justification for firing the Plaintiff was merely a pretext for race

and/or national origin discrimination. Accordingly, the Court will grant Defendant's summary judgment motion on Plaintiff's Title VII claim.

In light of this Order and Partial Judgment, the Court notes that only Plaintiff's FMLA claim remains pending for trial and that, under the Scheduling Order, the Parties' proposed pretrial order is due on January 17, 1997. The Court believes that mediation of this matter may be appropriate. Thus, in case the Parties' have not already attempted mediation, the Court will order the Parties' to show cause why the Court should not order the Parties to mediation.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendant's Motion for Summary Judgment is hereby GRANTED IN PART and DENIED IN PART and that Plaintiff's claim brought pursuant to Title VII of the 1964 Civil Rights Act is hereby DISMISSED WITH PREJUDICE.

IT IS FURTHER ORDERED that Plaintiff's Motion for Partial Summary Judgment is hereby DENIED.

IT IS FURTHER ORDERED that the Parties SHOW CAUSE within eleven (11) days of the date of this Order, by filing a joint document with the Clerk of the Court, why the Court should not order the Parties to mediation on Plaintiff's FMLA claim before this matter proceeds to trial.

SIGNED AND ENTERED this 10th day of December, 1996.

s/ James R. Nowlin

JAMES R. NOWLIN
UNITED STATES DISTRICT JUDGE